72-322 FILE COPY

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-322

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT LINES, INC.,

Petitioners,

—against—

IRON ORE TRANSPORT CO., LTD. as Owner of the Steam Vessel RUTH LAKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1972

No. _____

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT LINES, INC.,[1]

Petitioners,

—against—

IRON ORE TRANSPORT CO., LTD. as Owner of the Steam Vessel RUTH LAKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on June 13, 1972.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals printed in Appendix A hereto, *infra,* p. 6a, is reported in F. 2d . The decision of the District Court holding both the s/s Ruth Lake and the s/s Flying Foam

[1]Since the decision of the U. S. Court of Appeals for the Fourth Circuit the name of American Export Isbrandtsen Lines, Inc. was changed to American Export Lines, Inc.

at fault is unreported but is reprinted in the appendix, *infra*, (8a).[2]

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals affirming on the opinion of the District Court was entered on June 13, 1972 (6a).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Does the admiralty rule of equal division of damages apply to a collision in which one vessel was guilty of at least five major statutory faults, i.e., she did not maintain a competent lookout, she did not sound fog signals, she proceeded at a clearly immoderate speed of 16 knots in conditions of restricted visibility, she failed to use her radar in the manner prescribed by the annex to the International Rules of the Road (33 U. S. C. § 1094), and she did not have on board radar qualified personnel while the other vessel was guilty of only a minor fault, i.e., speed of 8 knots, slowing to 4 knots?

2. Does 33 U. S. C. § 1090(a) permit the Fourth Circuit Court of Appeals to sanction a rule that a vessel in International Waters must sound a signal when making a course change even if that vessel, though having been seen both on radar and glimpsed visually by the other vessel, has not sighted any vessel, contrary to the holding of the First Circuit Court of Appeals in *Gould* v. *Boston & Philadelphia Steamship Co.*, 55 F. 426 (1 Cir. 1893)?

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[2]Page numbers followed by the letter "a" are references to the corresponding page in the appendix appended hereto.

3. Does 33 U. S. C. § 1077(a) permit the Fourth Circuit Court of Appeals to sanction a rule that a vessel navigating in conditions of restricted visibility must proceed at a slower speed than that which would enable her to be stopped in one-half distance between her and any point along her projected course at which she might collide with any vessel emerging from rain squalls on any course?

STATUTES INVOLVED

The Statutory Provisions involved, all from the International Regulations for Preventing Collisions at Sea, are: 77 Stat. 195, 33 U. S. C. § 1061(c)(ix); 77 Stat. 203, 33 U. S. C. § 1075; 77 Stat. 203, 33 U. S. C. § 1076; 77 Stat. 205, 33 U. S. C. § 1077; 77 Stat. 207, 33 U. S. C. § 1090; 77 Stat. 208, 33 U. S. C. § 1091; 77 Stat. 209, 33 U. S. C. § 1094. They are printed in the appendix, *infra*, pp. 1a to 5a.

STATEMENT OF THE CASE

(a) Basis For Federal Jurisdiction

This action arose out of a marine collision in International Waters between the petitioner's American Steamship Flying Foam and the respondent's British Steamship Ruth Lake off the Virginia coast May 7, 1967. An action was commenced in the United States District Court for the Eastern District of Virginia, Norfolk Division, on June 5, 1967, under the procedures specified in Rule 9(h) of the Federal Rules of Civil Procedure.

(b) The Facts

In the early morning of May 7, 1967, the British Steamship Ruth Lake, bound from Baltimore to Charleston, S. C. in ballast, rammed the lightly loaded American Steamship

Flying Foam bound from San Juan, Puerto Rico, for Norfolk. The Flying Foam was struck in the port quarter in the way of her #5 hatch. There was no cargo damage.

(i) The Flying Foam's Navigation

The Flying Foam, observing all precautions required by law, with a full crew, with her lookout on the forecastle head and with proper equipment on board, was approaching Norfolk. Visibility, while originally good, was steadily worsening and consequently she was sounding fog signals and had twice reduced her speed before sighting the Ruth Lake. Her radar was inoperative but there was no negligence shown in the maintenance nor was the gear that required replacement a spare part that should have been carried on board the vessel. When she sighted the Ruth Lake the Flying Foam had already ordered slow ahead (4 knots). At 12 knots she could have stopped within ½ mile. She had seen the Chesapeake Bay Approach Buoy dead ahead over a mile away and swung right to avoid it.

(ii) The Ruth Lake's Navigation

The Ruth Lake was proceeding in reduced visability, with her lookout on the bridge, at 16 knots, her full speed. This speed was not reduced before sighting the Flying Foam immediately before the collision even though the Flying Foam had been seen on radar at a distance of six miles and even though she had been visually sighted from time to time thereafter. The Ruth Lake was not sounding fog signals; her master or officers had no radar endorsements on their licenses, and they did not observe their own radar after the Flying Foam had closed to three miles.

(iii) The Collision

The Ruth Lake in a heavy rain squall emerged about one-quarter mile from the Flying Foam on the Flying

Foam's port bow. The Flying Foam emerged on the Ruth Lake's starboard bow. Both ships immediately went hard right and reversed. As the Flying Foam bridge crossed the bow of the Ruth Lake, the Flying Foam went hard left and swung her stern almost clear of the Ruth Lake.

REASONS FOR GRANTING THE WRIT

1. The Collision occurred May 7, 1967. The trial was completed June 28, 1968. The opinion of the District Court was handed down September 16, 1971. The case was argued in the United States Court of Appeals for the Fourth Circuit on June 6, 1972. The Court of Appeals decision was rendered June 13, 1972.

The District Court decision, obviously rendered on the record, follows the anachronistic divided damage collision rule whereby if any vessel's fault contributes at all to a collision she is liable for one-half of the damages. This rule long enforced in the United States has resulted in crowding admiralty calendars and making for many additional trials. A vessel primarily at fault will often proceed to litigation bearing in mind that, even if she be operating in thick weather at full speed with untrained personnel and without blowing fog signals, she may be lucky enough to obtain a both-to-blame result from one minor infraction by the other vessel. Such a rule subsidizes litigation.

While the one-half damage rule is now law in the United States, this Court has granted certiorari in *Union Oil Company of California* v. *Tug Boat San Jacinto,* 304 F. Supp. 519 (Or. 1969), mod'd, 451 F. 2d 1369 (9 Cir. 1971), cert. granted, 405 U. S. 954 (1972), a case in which the factual situation exactly parallels that in this case. It is expected that one issue with which this Court will deal and, possibly will modify, is the admiralty rule of equal division of damages as applied to a collision in which

one vessel has been flagrantly negligent while the other vessel may have committed only a minor statutory infraction.

It is hoped that the equal division of damages rule which has worked so many harsh injustices in the area of international commerce will be modified beyond the slight modification brought about through the major-minor fault doctrine.

2. The District Court and the Court of Appeals ignored the statutory requirement that the international rules require change of course signals only when the vessels are in sight of each other. The testimony of both vessels is clear that, when the Flying Foam changed course to avoid striking the buoy, she could not see the Ruth Lake, and the Ruth Lake could not see her.

The District Court found the Flying Foam guilty for the failure of the Flying Foam to signal a course change made at 0242 at which time Flying Foam had no vessel within sight. The District Court opinion cites no authority in support of this interpretation of 33 U. S. C. 1090(a), which, in pertinent portion, reads:

> "(a) When vessels are in sight of one another, a power driven vessel underway in taking any course authorized . . . shall indicate that course by the following signals on her whistle . . ." (3a).

The District Court's finding is faulty not only in light of the above statute's clear language, but is in direct conflict with the interpretation of this rule made by the First Circuit Court of Appeals:

> "By that article a steamship underway has permission—only permission—to employ the signals therein named for communication with 'a ship which

> he has in sight.' They are not signals allowed in a fog, or other state of the atmosphere, when sight is cut off. Absolute knowledge of the relative positions of the vessel, such as sight only can convey, is a prerequisite to their use." *Gould* v. *Boston & Philadelphia Steamship Co.*, 55 F. 426, 432 (1 Cir. 1893).

Not only has research uncovered no decision of this Court which interprets 33 U. S. C. 1090 (a), but the same sighting requirement has been kept in the Revision of the Regulations for Preventing Collisions at Sea drafted by the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, an affiliate of the United Nations, and is under consideration by the Maritime Safety Council of the United States Coast Guard (Rule 47).[3] In addition, it should be noted that 33 U. S. C. § 1061 (c) (ix) defines "in sight of one another" as when one vessel can be observed "visually" from the other (1a).

3. The Flying Foam was proceeding at such a speed that she could stop within one-half mile, and after reviewing her expert's testimony even the Ruth Lake conceded in her brief to the Court of Appeals that the Flying Foam sighted the buoy a "little more than a mile away." Nevertheless, the District Court stated the speed of the Flying Foam was improper since she did not observe the Ruth Lake before the Ruth Lake emerged out of a rain squall off to port at a distance of ¼ mile. How the Flying Foam could have known the visibility was reduced off her port bow but not straight ahead was never explained.

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[3]Maritime Safety Committee (25th Session) of the Intergovernmental Maritime Consultative Organization, Rule 47 (a), Document MSC XXV/3 (b)/1, dated 10 February 1972, Safety of Navigation, Revision of the Regulations for Preventing Collisions at Sea (see Appendix C, 19a).

... Assuming *arguendo* that the finding of the District Court that the Flying Foam was traveling at an excessive speed has some basis, which it does not, the affirmance by the Fourth Circuit Court of Appeals of the District Court decision is in conflict with the decision of the First Circuit Court of Appeals in *Gertrude Parker, Inc.* v. *Abrams,* 178 F. 2d 259 (1 Cir. 1949).

Gertrude Parker, supra, involved a collision on the open sea under conditions of restricted visibility, i.e., approximately 25 to 65 yards visibility. The Skilligolee had commenced her trip at 0430 hours at a speed of 8 to 9 knots but, at 0930 hours, encountered heavy fog and reduced speed to 5 or 6 knots and commenced sounding fog signals. She had a lookout posted on her bow and her navigation lights were lit and in order. The Gertrude Parker had maintained her full cruising speed of 8 to 9 knots at all pertinent times even though she had encountered fog approximately one-half hour before the time of the collision, and, in addition, there was a finding by the District Court that she had not sounded fog signals.

On appeal, the Gertrude Parker conceded its fault but made several contentions regarding alleged faults of the Skilligolee, the most substantial of which dealt with the speed of the Skilligolee.

The Court conceded that the Skilligolee "even at her reduced speed, could not be stopped in her share of the visible distance ahead . . . but this does not conclusively establish that her speed was immoderate."

> "The 'visible distance' test of moderate speed under the Rule, although useful in many situations, and frequently applicable, is not a universal one to be applied blindly." *Gertrude Parker, supra,* at p. 264.

In *Gertrude Parker, supra,* not only did the First Circuit recognize that the visible distance test is a flexible one but also acknowledged that the major-minor fault doctrine can be applied in circumstances involving possible immoderate speed where a collision is apparently caused by the overwhelming fault of one vessel:

> "Moreover, since the Gertrude Parker's conceded faults were gross, we are not called upon to scrutinize the Skilligolee's minutely, or to draw doubtful inferences against her, to discover if she also may not have been at fault [citations omitted]" (at p. 264).

It is undisputed that the Ruth Lake did not have a lookout stationed at her bow, failed to reduce her speed from 16 knots in conditions of restricted visibility and failed to sound fog signals at any time—precisely the faults which the *Gertrude Parker* either conceded or was found guilty of.

Thus, in accordance with the *Gertrude Parker, supra,* decision, it was clearly erroneous for the Fourth Circuit Court of Appeals to affirm the District Court's opinion in which the District Court scrutinized the Flying Foam's conduct "minutely" and drew "doubtful inferences against her, to discover if she also may not have been at fault." *Gertrude Parker, supra,* at p. 264. The Fourt Circuit Court of Appeals permitted to stand a decision in direct conflict with the *Gertrude Parker, supra,* decision.

This Court recently granted certiorari in *Union Oil Company of California* v. *Tugboat San Jacinto, supra,* where the Court of Appeals had reversed a finding of sole fault in the District Court on the grounds that a vessel proceeding slowly and cautiously in the fog was nevertheless at fault for excessive speed. This, as stated above, is parallel to the situation here.

4. In an apparent effort to relieve the maritime doctrine of equally divided damages for joint fault in collision of its often harsh and unjustifiable effect, this Court has often applied the "major-minor fault doctrine:"

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least at first to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." *The City of New York,* 147 U. S. 72, 85 (1893).

And this Court, in *The Victory & The Plymothian,* 168 U. S. 410, 423 (1897), elaborated somewhat on the quantity of evidence necessary to establish fault on the part of a vessel whose fault was slight or a non-contributing factor:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment."

The faults of commission and omission of the Ruth Lake were gross and inexcusable.

Thus the Ruth Lake violated 33 U. S. C. 1077 (a) by steaming at her full sea speed in conditions of restricted visibility, since, at that speed, she needed at least six minutes to stop.

The Ruth Lake violated 33 U. S. C. 1076 (a) (b) (c) (i) by failing to sound fog signals since she was navigating under conditions of restricted visibility.

The Ruth Lake violated 33 U. S. C. 1091 by failing to maintain a proper lookout i.e. a lookout on the bow. *Anthony* v. *International Paper Company,* 289 F. 2d 574 (4 Cir. 1961). *The Vedamore,* 137 F. 844 (4 Cir. 1905).

The Ruth Lake violated 33 U. S. C. 1094 (1) (2) in that her Captain and Mate made assumptions based on scanty information from their radar scope, in that they ignored radar indications of one or more vessels in the vicinity which "may mean that 'moderate speed' should be slower than a mariner without radar might consider moderate in the circumstances." 33 U. S. C. 1094 (2). It should also be pointed out that the previously referred to Revision of the Regulations for Preventing Collision at Sea under consideration by the Marine Safety Council provide that one factor to be taken into consideration when determining "safe speed" is the "proper use of radar to assess risk of collision."[4] The Ruth Lake fell far short of meeting this requirement.

Under this Court's decisions in *The City of New York, supra,* and in *The Victory & The Plymothian, supra,* the gross faults of the Ruth Lake made her solely responsible for the collision and the Court of Appeals affirmance of the District Court's decision to the contrary is in conflict with these decisions.

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[4]Maritime Safety Committee, *supra* note 3, Rule 7 (b) (ii) (see Appendix C, 19a).

CONCLUSION

FOR THE FOREGOING REASONS IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI HEREIN BE GRANTED.

Dated: August 24, 1972.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Title 33 of United States Code (1970)—Navigation and Navigable Waters
Chapter 21—International Regulations for Preventing Collisions at Sea

77 Stat. 195 (1963), 33 U. S. C. § 1061(c)(ix) (1970)

Scope of sections 1061 to 1904 (Rule 1).

* * *

(c) Definitions.

In sections 1061 to 1094 of this title, except where the context otherwise requires—

* * *

(ix) vessels shall be deemed to be in sight of one another only when one can be observed visually from the other;

77 Stat. 203 (1963), 33 U. S. C. § 1075 (1970)

General considerations of radar.

1. The possession of information obtained from radar does not relieve any vessel of the obligation of conforming strictly with sections 1061 to 1094 of this title and, in particular, the obligations contained in sections 1076 and 1077 of this title.

2. The Annex to the Rules contains recommendations intended to assist in the use of radar as an aid to avoiding collision in restricted visibility.

77 Stat. 203 (1963), 33 U. S. C. § 1076 (1970)

Sound signals (Rule 15).

(a) Power-driven, and sailing vessels.

A power-driven vessel of 40 feet or more in length shall be provided with an efficient whistle, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn to be sounded by mechanical means, and also with an efficient bell. A sailing vessel of 40 feet or more in length shall be provided with a similar fog horn and bell.

(b) Methods of sending.

All signals prescribed in this section for vessels under way shall be given—

(i) by power-driven vessels on the whistle;

(ii) by sailing vessels on the fog horn;

(iii) by vessels towed on the whistle or fog horn.

(c) Number and length of blasts and rings.

In fog, mist, falling snow, heavy rainstorms, or any other condition similarly restricting visibility, whether by day or night, the signals prescribed in this section shall be used as follows—

(i) A power-driven vessel making way through the water shall sound at intervals of not more than 2 minutes a prolonged blast.

* * *

77 Stat. 205 (1963), 33 U. S. C. § 1077 (1970)

Speed in weather restricting visibility (Rule 16).

(a) Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at

a moderate speed, having careful regard to the existing circumstances and conditions.

(b) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, go far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

(c) A power-driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually may take early and substantial action to avoid a close quarters situation but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop her engines in proper time to avoid collission and then navigate with caution until danger of collision is over.

77 Stat. 207 (1963), 33 U. S. C. § 1090 (1970)

Sound signals indicating course (Rule 28).

(a) Meaning of blasts.

When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorised or required by sections 1061 to 1094 of this title, shall indicate that course by the following signals on her whistle, namely—

One short blast to mean "I am altering my course to starboard".

Two short blasts to mean "I am altering my course to port".

Three short blasts to mean "My engines are going astern".

* * *

77 Stat. 208 (1963), 33 U. S. C. § 1091 (1970)

Usual additional precautions required generally (Rule 29).

Nothing in sections 1061 to 1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

77 Stat. 209 (1963), 33 U. S. C. § 1094 (1970)

Other general considerations.

Assumptions to be avoided.

(1) Assumptions made on scanty information may be dangerous and should be avoided.

Radar navigation; moderate speed; limitations of radar.

(2) A vessel navigating with the aid of radar in restricted visibility must, in compliance with section 1077(a) of this title, go at a moderate speed. Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed. In this regard it must be recognised that small vessels, small icebergs and similar floating objects may not be detected by radar. Radar indications of one or more vessels in the vicinity may mean that "moderate speed" should be slower than a mariner without radar might consider moderate in the circumstances.

Same; duty to stop.

(3) When navigating in restricted visibility the radar range and bearing alone do not constitute ascertainment of the position of the other vessel under section 1077(b) of this title sufficiently to relieve a vessel of the duty to stop her engines and navigate with caution when a fog signal is heard forward of the beam.

Close quarters; circumstances to guide alterations of course or speed.

(4) When action has been taken under section 1077(c) of this title to avoid a close quarters situation, it is essential to make sure that such action is having the desired effect. Alterations of course or speed or both are matters as to which the mariner must be guided by the circumstances of the case.

Close quarters; alteration of course to avoid.

(5) Alteration of course alone may be the most effective action to avoid close quarters provided that—

(a) There is sufficient sea room.

(b) It is made in good time.

(c) It is substantial. A succession of small alterations of course should be avoided.

(d) It does not result in a close quarters situation with other vessels.

Alteration of course; circumstances to guide direction; general preference for alteration to starboard.

(6) The direction of an alteration of course is a matter in which the mariner must be guided by the circumstances of the case. An alteration to starboard, particularly when vessels are approaching apparently on opposite or nearly opposite courses, is generally preferable to an alteration to port.

* * *

APPENDIX B

Opinion of the Court of Appeals

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 72-1185

IRON ORE TRANSPORT CO., LTD, as Owner of the Steam Vessel RUTH LAKE,

Appellee,

v.

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Appellants.

No. 72-1186

IRON ORE TRANSPORT CO., LTD., as Owner of the Steam Vessel RUTH LAKE,

Appellant,

v.

The Steam Vessell FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, Chief Judge.

AFFIRMED

(Argued June 6, 1972. Decided June 13, 1972.)

Before BUTZNER, RUSSELL, and FIELD, Circuit Judges.

Robert M. Hughes, III (James M. Estabrook, Hollis M. Walker, Jr., Richard A. Corwin, Seawall, McCoy, Winston & Dalton, and Haight, Gardner, Poor & Havens, on brief) for the Steam Vessel FLYING FOAM and American Export Isbrandtsen Lines, Inc.; Guilford D. Ware (Francis N. Crenshaw and Crenshaw, Ware & Johnson, on brief) for Iron Ore Transport Co., Ltd., as Owner of the Steam Vessel RUTH LAKE.

Appendix B

PER CURIAM:

This appeal arises out of the collision between the freighters RUTH LAKE and FLYING FOAM off the Virginia coast. The district court found both vessels at fault and decreed the division of damages. Upon consideration of the briefs, record and argument, we affirm on the opinion of the district court. Iron Ore Transport Co., Ltd. v. The Steam Vessel FLYING FOAM, Civ. No. 6219 (E. D. Va. 1971).

Opinion of the District Court

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IRON ORE TRANSPORT CO., LTD., As Owner of the Steam Vessel RUTH LAKE,
Plaintiff,

v.

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Defendants.

Civil Action No. 6219

MEMORANDUM

This controversy involves a collision between the RUTH LAKE, owned and operated by Iron Ore Transport Co., Ltd. and the FLYING FOAM, owned and operated by American Export Isbrandtsen Lines, Inc., which occurred on May 7, 1967, at approximately 0246 E.D.S.T. in the international waters off the coast of Virginia. The RUTH LAKE departed Baltimore in ballast on the afternoon of May 6, 1967, bound for Charleston, South Carolina. She had picked up a Chesapeake Bay pilot who left the vessel at approximately 0203 on May 7, 1967, at the pilot ship. She commenced her sea voyage at about 0230. The FLYING FOAM departed San Juan, Puerto Rico, on May 4, 1967, bound for Norfolk, Virginia. She was inbound at the time of collision, with the RUTH LAKE being outbound.

We hold, for reasons stated herein, that there was mutual fault on the part of the two vessels. Damages will accordingly be divided.

The RUTH LAKE is a large ore carrier of 21,156 gross tons[1], with a length of 661 feet and a beam of 87 feet. When she proceeded outbound via Chesapeake Bay, there was light rain. The gyro compass was on but it had an easterly error of 5 degrees. The captain took the conn after the statutory pilot left the ship. Visibility was estimated by one witness at from 4 to 5 miles, and by another witness at 5 to 7 miles, in rain, the calculation of the latter estimate being at 0207. Captain Yung Ling, the master of the RUTH LAKE, had a Canadian master's license but no radar endorsement. The mate on watch, Shiau, likewise had no endorsement on his license and had never taken a training course.

At 0211 full speed of 16 knots was ordered. At 0220 the lookout was called back from the bow and stationed on the wing of the bridge, a distance of 225.5 feet farther aft. At 0230 the RUTH LANE commenced her sea voyage. The mate on watch checked to see if cross bearings could be used, but found that the rain had impaired visibility to an estimated 3 miles. The mate proceeded to the chart room to fix the ship's position and gave the order to secure one or the steering motors.

At 0220 the lookout spotted one white light. At 0232 he reported spotting lights on the starboard bow, but the master was unable to make a visual sighting as the rain

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[1]Captain Ling testifies that the gross tonnage was 21,156.14. The post-trial brief of the RUTH LAKE refers to 31,157 gross tons. While we deem the point immaterial, we accept Captain Ling's testimony and assume that counsel are in error.

had obscured his vision. Radar observation put the observed ship at a range of 6 miles.

The master of the RUTH LAKE estimated that, at approximately 0237, the white lights of the approaching vessel (later discovered to be the FLYING FOAM) were spotted visually by the mate who saw two white lights with his binoculars, but again the captain could not locate the lights as they had disappeared. Radar at this time put the distance at 3 miles on the starboard bow of the RUTH LAKE.

The captain of the RUTH LAKE was of the opinion that the bearing of the approaching vessel was changing to the starboard of the RUTH LAKE, and that there was no danger of a collision. The mate reported that the bearing was opening. The rain increased, but no plots were made of the course of the vessel sighted on radar. Only relative bearings at 6 and 3 miles were obtained, and the master of the RUTH LAKE did not again look at the radar after sighting the other vessel at 3 miles. The master did not put the RUTH LAKE on automatic pilot as he wanted to clear the other vessel before switching off manual control.

At no time did the RUTH LAKE blow any fog signals; nor did she hear any such signal although the lookout reported fog and bad weather.

The FLYING FOAM, under command of Captain Friend, had a draft of 11′ 2″ forward and 15′ 10″ aft. While she had 659 long tons of general cargo aboard, this was considered a "light condition" for this vessel, it being a standard C-3 freighter of 492 feet in length with a beam of 69 feet, and of 7,821 gross tons. There was a full watch set, including an officer, quartermaster, lookout on the bow, and various engine room personnel. In accordance with previous instructions, the master had been called at 0115.

The radar on the FLYING FOAM was inoperative and could not be repaired on board. The part required to correct the defect was not customarily carried at sea. The fathometer had been inoperative at least since December, 1966, when Captain Friend came aboard.

There was an area of disagreement regarding estimates of visibility among those standing watch aboard the FLYING FOAM. This is based on the fact that there were no objects in sight and the fog was rolling in and out in banks.

Landfall was made at 2253 on May 6 when the Bodie Island Light was sighted at approximately 19.6 mines. Between midnight and 0100 on May 7 the lookout and helmsman reported sighting at least one and perhaps two ships. At 0100 McGovern took the lookout watch on the bow. Anderson, the third mate, sighted Currituck Light at 0103 at 10 to 11 miles with binoculars, with visibility on ships at 6 to 7 miles. After the captain was called at 0115 a buoy was spotted at about 0120. At 0136 the FLYING FOAM had False Cape Buoy 4A about 1000 feet abeam. Rain and fog began at this time and visibility on shore lights was estimated at 6 to 7 miles. The FLYING FOAM changed course at this time to 341 degrees to stay to seaward of buoy 2CB, then approximately 17 miles away. At 0215 the vessel altered her course to 345 degrees.

The third mate, Anderson, testified that no buoy was reported or seen between 0136 and the sighting of buoy 2CB. McGovern, the lookout, states that he saw a flashing red buoy shortly after sighting the False Cape buoy. There is a wreck buoy between False Cape and 2CB, which is apparently what McGovern observed. By 0200 the fog was getting heavier and banks were rolling in and out.

At 0224 a rought bearing was taken by radio but there was considerable interference. At 0230 the FLYING FOAM commenced blowing fog signals by hand. Visibility was reduced, according to the third mate, with a glow around the lights. The lookout gave a low estimate of visibility at from one to one and one-half miles.

The order was given to reduce to full ahead maneuvering speed of 12 knots at either 0230 or 0232. Shore lights were no longer visible. The master estimated visibility at 3 to 4 miles. At 0237 the FLYING FOAM did not know her position. The helmsman suggested that visibility worsened after 0232, but he was not sure of this statement. There was no navigational aid to assist in judging visibility, but the usual visibility of buoy 2CB was 5 miles with no fog. Just prior to sighting buoy 2CB at 0242, the mate was sent to the chart room to fix a position by radio bearing. This was the only time he went to the chart room after 0200, but the master went there at 0230 to estimate when buoy 2CB should be sighted.

When buoy 2CB was sighted at 0242, the master said it was "a mile or so dead ahead." The mate declined to make an estimate. The lookout calculated one-quarter of a mile. Fog was very thick at the time.

Captain Friend gave the order to bring the vessel hard right from 345° to 005° at 0242 to pass buoy 2CB to port. No signal was sounded by the FLYING FOAM to indicate the navigational change, and no vessel had been sighted by the FLYING FOAM at the time. At 0245 the order was given to reduce speed to slow ahead, about 4 knots. Within the intervening minute the RUTH LAKE was observed close ahead to port at one-quarter of a mile. The lookout expressed the view that the RUTH LAKE and buoy 2CB were seen at almost the same time and at about the same one-

quarter of a mile from the FLYING FOAM, with the RUTH LAKE slightly inboard of the buoy.

Obviously, at this time, the ships were *in extremis* and measures taken by the vessels to avoid the collision are largely immaterial. There is no contention by either party that liability should attach by reason of faulty emergency procedures at this point. The RUTH LAKE collided with the port quarter of the FLYING FOAM in the area of the after end of her No. 5 hold and steering engine room.

When the collision occurred at 0246 the speed of the FLYING FOAM was estimated at 8 knots. Her stopping distance at 12 knots is one-half mile according to tests run under similar conditions after the collision. The stopping distance of the RUTH LAKE is more difficult to determine. She travels through the water approximately seven-tenths of a mile in 3 minutes while proceeding at full speed. At a steady rate of deceleration, the RUTH LAKE would stop in three-fourths of a mile in 6 minutes. The RUTH LAKE at no time decreased her speed from 16 knots until the vessels were *in extremis.*

Buoy 2CB is a flashing white light powered by 200 candle power at an average height of 15 feet above water. It is the largest type buoy in use, being 9 feet in diameter and 38 feet in length, equipped with a radar reflector attached to it. It is known as the Chesapeake Bay approach buoy as it marks the focal point for all deep-draft vessels entering or leaving Chestpeake Bay or Hampton Roads. It is the "Times Square of the South" and is acknowledged to be located in the area of heavy water traffic.

We have no difficulty in condemning both vessels under the circumstances of this case. Captain Friend of the FLYING FOAM admitted knowledge of the fact that he was coming into "restricted waters," by which he meant where

there was "a lot of traffic." With limited visibility and an inoperable radar and fathometer, and with no assurance of his position until 4 minutes prior to the collision, he proceeded at full speed. His reduction of speed to slow ahead at 0245 had very little effect upon the speed insofar as it related to the collision. In *Villain & Fassio E. Compagnia* v. *Tank Steamer E. W. Sinclair,* 313 F. 2d 722, 723 (2 Cir. 1963), the court condemned a speed of 11½ knots under somewhat similar circumstances, although visibility was perhaps more limited, where it said:

> "The SINCLAIR was plainly guilty of faulty navigation in proceeding into heavy fog with visibility of rarely more than half her length, with her radar out of order, in and near a heavily traveled channel, at so high a speed."

While the facts in *United States* v. *M/V Werttemberg,* 330 F. 2d 498 (4 Cir. 1964), are quite different, the language of Judge (now Chief Judge) Haynsworth seems peculiarly appropriate where he said (p. 503):

> "The pilot had every reason to realize that visibility was tremendously reduced, and that, without radar, he was proceeding blindly into a situation which might call for close passage with other outbound vessels. That he did not go to slow ahead or take other precaution, when he had abundant reason to believe that visibility had been reduced to the danger point, warranted the District Court's conclusion of fault on the part of Werttemberg. The original reduction of speed to half ahead may not have been incautious if taken early enough, but when the landmarks could not be seen when the Werttemberg

had approached to within less than one mile of them, further action was required."

Under normal visibility buoy 2CB would have been sighted at approximately 0221. As noted above, the buoy was finally sighted at 0242—21 minutes later—and then to the starboard and not off the port bow. This is what prompted Captain Friend to give a hard right order at 0242.

In the landmark case of *British Transport Commission* v. *United States*, 230 F. 2d 139 (1956), affd. 354 U. S. 129 (1957), the appellate courts accepted a finding by the district judge, 131 F. Supp. 712, 715, where he said:

> "The DUKE was running through a 'patchy' fog—'very thick at times' and then fairly clear intervals. She was piercing one fog bank after another . . . From 3 A. M. on, the fog was 'very thick' . . . In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the 'moderate speed' injunction in the fog rules of Article 16, International Rules, 33 U. S. C. A. § 145N. It was an overriding and major fault; collision was a foreseeable result . . . At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, half ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to slow, 6 knots."

What has been said with respect to the fault of the FLYING FOAM is equally applicable to the RUTH LAKE. Both vessels approached a point of heavy traffic at too great a speed under the circumbstances here prevailing.

While the RUTH LAKE argues that the FLYING FOAM is solely at fault by reason of the order to go hard right to pass buoy 2CB to port, we cannot agree that this was the only major fault involved. In *Standard Oil Company of California* v. *S.S. Rotti*, 286 F. Supp. 677 (N. D. Cal. 1967), aff'd. *per curiam sub. nom. N.V. Stoomvaart Maatschappij "Nederland" and the S.S. Rotti* v. *Standard Oil Company of California*, adopting the opinion of the district court, 398 F. 2d 835 (9 Cir. 1968), cert. den. 393 U. S. 980 (1968), the situation confronting the S.S. ROTTI was virtually identical with that of the RUTH LAKE, the only material difference being that the vessel in collision with the ROTTI conceded its fault. Indeed, the ROTTI had even stronger grounds that the RUTH LAKE in urging that she acted prudently. Without detailing the facts in ROTTI, it is sufficient to state that, after knowledge that another vessel was outbound and the ROTTI inbound and having seen the vessel on her rader, she proceeded at an immoderate speed in a fog situation in violation of Rule 16(a) of the International Rules for Preventing Collisions at Sea. The condemned speed of the ROTTI was 12 knots; the speed of the RUTH LAKE was 16 knots, and she was admitting not sounding any fog signals. The RUTH LAKE has not overcome the heavy burden imposed by the rule in THE PENNSYLVANIA, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148 (1873), occasioned by the statutory faults of immoderate speed and no fog signals. Equally at fault was the FLYING FOAM with no operative radar and no knowledge as to her whereabouts until 0242—4 minutes prior to the collision—when she sighted buoy 2CB "a mile or so dead ahead" or perhaps only one-quarter of a mile as estimated by the lookout. It was at this point that the FLYING FOAM altered her course to starboard in order to pass the buoy to port. She

was then proceeding at 12 knots and it was not until one minute prior to the collision that an order was given to reduce speed to slow ahead, about 4 knots. What has been said as to the speed of the RUTH LAKE applies with equal force to the FLYING FOAM.

We do not believe that the major-minor fault rule as enunciated in the *City of New York*, 147 U. S. 72, 85 (1893), can be invoked by either vessel. As indicated by THE VICTORY & THE PLYMOTHIAN, 168 U. S. 410, 424 (1897), the determination of this issue is frequently a close question because subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. However, with respect to the RUTH LAKE and FLYING FOAM, we see no element of closeness. Both vessels were guilty of major faults.

We see no need to enter into any discussion of the failure of the RUTH LAKE to use her radar intelligently by plotting the course of the other vessel, although it would have been prudent to do so. It appears that, even without the course change by the FLYING FOAM, the crossing of the vessels would have been dangerously close, and it does not follow that the collision could necessarily have been averted to the extent of exonerating the RUTH LAKE from faulty navigation. We should also note that, at 0220, the lookout was called back from the bow of the RUTH LAKE and stationed on the wing of the bridge. Perhaps he could see better, and perhaps he could not, but at least he was 225 feet farther aft. These factors we would mention in detail if the controlling decision rested upon either point. However, with respect to the RUTH LAKE, we prefer to rest the judgment on immoderate speed and no fog signals, all with knowledge of the fact that another vessel was in the area of heavy water traffic. The fault of

the FLYING FOAM is obviously clear in that, although fog signals were sounded, the speed was excessive with no operable radar, fog, and limited visibility, combined with a course change only 4 minutes prior to the collision, which change was not accompanied by any signal.

We know, of course, that the "visible distance" rule of "moderate speed" should not be applied blindly, but where there is knowledge, either actual or constructive, of the presence of other vessels in the vicinity—actual knowledge of the RUTH LAKE and constructive knowledge of the FLYING FOAM—with the limited visibility here shown, the speed may well be immoderate regardless of whether the "visible distance" test of moderate speed is applicable or not. *Gertrude Parker, Inc.* v. *Abrams,* 178 F. 2d 259, 264 (1 Cir. 1949).

A decree may be presented dividing the damages and referring the matter to a commissioner for an appropriate reference, allowing a reasonable time, not exceeding 120 days for the parties to attempt to agree upon the total damage.

(Signed) WALTER J. HOFFMAN
United States District Judge

Norfolk, Virginia
September 16, 1971

APPENDIX C

Miscellaneous

Maritime Safety Committee (25th Session) of the Inter-Governmental Maritime Consultative Organization, Document MSC XXV/3(b)/1, dated 10 February 1972—Safety of Navigation; Revision of the Regulations for Preventing Collisions at Sea.

Rule 7—Safe Speed

Every vessel shall at all times proceed at a safe speed. In determining safe speed the following factors shall be taken into account:

(a) For all vessels:

(i) the state of the visibility;

(ii) the prevailing state of wind, sea and current;

(iii) the traffic density including concentrations of fishing vessels or any other vessels;

(iv) the proximity of navigational hazards;

(v) the manoeuverability with special reference to stopping distance and turning ability in the prevailing conditions.

(b) For vessels with operational radar:

(i) the characteristics, efficiency and limitations of the radar;

(ii) the proper use of radar to assess risk of collision;

(iii) the effect of the state of the sea and weather and other sources of interference on radar detection;

(iv) the possibility that small vessels, ice and oth floating objects may not be detected by radar an adequate range;

(v) that radar indications of one or more vessels the vicinity, in conditions of restricted visibili may mean that "safe speed" should be slow than a mariner without radar might consid safe in the circumstances;

(vi) any constraints imposed by the radar range sca used.

Rule 47—Manoeuvering signals

(a) When vessels are in sight of one another, a power driven vessel under way, in taking any course autho ized or required by these Rules, shall indicate th course by the following signals on her whistl namely:

—one short blast to mean "I am altering my cours to starboard";

—two short blasts to mean "I am altering my cours to port";

—three short blasts to mean "I am operating astern propulsion".

* * *